MAY 13 1972

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IN THE

Supreme Court of the United States

1971 TERM

No. .....

EDGAR EUGENE HARNESS, JR.,
Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner, Edgar Eugene Harness, Jr., prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above styled case on February 18, 1972.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky is reported at 475 S.W. 2d 485, and printed in the Appendix, *infra,* pp. 15-24. It affirmed the judgment of the Rowan Circuit Court, which is printed in the Appendix, *infra,* pp. 13-14.

Jurisdiction

The final judgment of the Court of Appeals of Kentucky was entered on February 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Question Presented

Does the Fourteenth Amendment deny state police officers the right to use entrapped evidence or information obtained during the course of a scheme of entrapment in an affidavit to support the issuance of a search warrant?

STATEMENT OF THE CASE

(a) Nature of the Case and Course of Proceedings.

Edgar Eugene Harness, Jr., Petitioner, was charged with and indicted for (a) possession of dangerous drugs (two counts); and, (b) sale of dangerous drugs (two counts). Petitioner moved to suppress all the evidence and controvert the search warrant. Upon motion, the Court held an oral hearing on entrapment and concluded that there was entrapment and suppressed evidence as to marijuana involved but over Petitioner's objection allowed the search warrant to stand.

The trial began May 27, 1970, resulting in a verdict of guilty of possessing dangerous drugs. A judgment of conviction and commitment was entered, fixing his punishment at confinement in the penitentiary for five years and a fine of $5,000.00. Appendix, *infra*, pp. 13-14.

Petitioner appealed that judgment to the Court of Appeals of Kentucky and that court affirmed the judgment by original opinion on October 22, 1971, overruled Petitioner's petition for rehearing on February 18, 1972, and issued the mandate.

Petitioner applies for a writ of certiorari to the order overruling his petition for rehearing and the issuance of the mandate.

(b) Statement of Facts.

Trooper Herbert Bowling of the Kentucky State Police, in Rowan County, Kentucky, swore to the affidavit which supported the search warrant in this case, the pertinent parts of which are as follows:

(a) ". . . Dave Roberts alighted from the Affiant's automobile, knocked on the house trailer door, and "Sonny" Harness came to the door, talked with Dave Roberts, and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and "Sonny" Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to the Affiant, and told Affiant that he had purchased these pills from "Sonny" Harness for Five ($5.00) Dollars, which Affiant had previously given Roberts.

(b) "Further Affiant states that on 27th February, 1970, at 9:45 p.m. local time he went to the above described trailer and purchased ten (10) grams of hashish or marijuana from Edgar Eugene Harness for which Affiant paid the said Harness the sum of $32.50 U. S. currency." T.E., Vol. 3, p. 74; Defendant Exhibit No. 3; Appendix, *infra*, p. 29.

The Kentucky State Police in the evening of the day the Rowan County affidavit was made, searched the premises of the Petitioner and found, among other things, twenty-five LSD tablets, T. E., Vol. 3, p. 128. Petitioner was arrested and charged with both selling and possession of marijuana and LSD. T. E., Vol. 3, p. 129. That same night Trooper Bowling returned to Fayette County, Kentucky, and made an affidavit to support a search warrant for the premises occupied by Mr. and Mrs. Larry Berger. In that affidavit he swore that he purchased twenty grams of marijuana from

Larry Knight (actually Larry Berger). T. E., Vol. 3, pp. 49-50; Defendant Exhibit No. 2, Appendix, *infra*, p. 27. During the oral hearing, Bowling admitted that this was the same marijuana he had sworn he had purchased from Petitioner in Rowan County in the first affidavit mentioned herein. T. E., Vol. 3, p. 124; Appendix, *infra*, p. 31. He further admitted that the only reason he gave drugs to Petitioner was so he could purchase them back from him. T. E., Vol. 3, pp. 78, 79; Appendix, *infra*, p. 30.

Petitioner moved the Court to controvert the search warrant and suppress the evidence because the affidavit contained illegally obtained information. T. E., Vol. 3, p. 142. A hearing was held and the trial court ruled there was entrapment but that the search warrant was valid and ordered that the trial against Petitioner continue upon the charge of possession of LSD. T. E., Vol. 3, p. 131.

The LSD found pursuant to the search warrant in this case was introduced as evidence in the trial. Petitioner was convicted of possession of LSD and sentenced to five years in prison and a fine of $5,000.00. An appeal was taken to the Court of Appeals of Kentucky. The conviction was affirmed by upholding the search warrant and stating that the affidavit was regular in form and that it was not proper to attack the integrity of the allegations of the affidavit; therefore allowing entrapped evidence to serve as the basis of probable cause for issuance of the search warrant. Opinion of the Court of Appeals of Kentucky, pp. 4, 5, Appendix, *infra*, p. 18.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine the substantial federal question, whether the Fourteenth Amendment denies State Police Officers the right to use entrapped evidence or information obtained during the course of a scheme of entrapment in an affidavit to support the issuance of a search warrant.

This issue was necessarily presented to the trial court and the Kentucky Court of Appeals as required by *Street* v. *New York*, 394 S.W. 576 (1969). (See T. E., Vol. 3, p. 131 and Appendix, *infra*, p. 31). (See question and argument "A", Brief for Appellant, pp. i, 1, 11 and Petitioner's petition for rehearing, pp. i, 5, where the question was squarely presented to the Court). The Kentucky Court of Appeals decided this issue unfavorably to Petitioner. The Kentucky Court had previously avoided deciding this issue in *Scott* v. *Commonwealth*, (Ky.) 197 S.W. 2d 774 (1946), by reversing on other grounds, but did decide it in this case by upholding the search warrant based on that portion of the affidavit that had been held to be entrapped evidence by the trial court.

This petition presents to this Court a substantial federal issue that is being handled by the lower court system without any uniformity or guidance. 84 Harv. L. Rev. 825 (1971); 67 Colum. L. Rev. 1529 (1967); 19 U.C.L.A. L. Rev. 96 (1971). The broad and general form of the narrow issue presented here is whether or not the integrity of an affidavit supporting a search warrant may be attacked? This court has never actually decided that issue or any of the more narrow

legal questions contained therein. *Rugendorf* v. *United States*, 376 U.S. 528, 532 (1964).

False or perjured testimony during trial within the knowledge of the state and not corrected is denial of due process under the Fourteenth Amendment. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Mooney* v. *Holohan*, 294 U.S. 103 (1935). Such matters are usually detected because they arise in an adversary proceeding. On the other hand, affidavits for search warrants are presented in *ex parte* proceeding where the sole judge of their integrity is often a magistrate not trained in law. *Clay* v. *United States*, 246 F. 2d 298 (5th Cir.), *cert. denied* 355 U.S. 863 (1957). To have such people deciding constitutional issues as important as a person's right to be free of unreasonable searches and not allow reasonable investigation into the integrity of the affidavit leaves the accused solely at the mercy of the sometimes unscrupulous affiant. In such cases the magistrate is not more than a rubber stamp for the dishonest affiant.

The affidavit to support the issuance of the search warrant in this case can be divided into two portions. The first portion relates to information received by the affiant from a named informant. Petitioner raised issues in the trial court and the Kentucky Court of Appeals with respect to this portion of the affidavit which have already been decided by this Court in *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *i. e.*, Where an informant is the source of information upon which the affidavit is based the affiant must allege facts showing the informant's reliability. The first portion of the affidavit in this case completely failed to meet these require-

ments. The Kentucky Court avoided these questions in Petitioner's case by stating that the above cited cases ". . . deal with the requirements of an affidavit . . . when information has been furnished by an unnamed informant . . . We do not consider it necessary to determine whether *Spinelli, Ventresca* and *Aguilar* are applicable to named informants, because we believe that the affidavit for the search warrant is sufficient without reference to the alleged purchase of the two (2) LSD tablets by Dave Roberts," (Opinion of the Court of Appeals of Kentucky, p. 4, Appendix, *infra,* p. 17. The Kentucky Court, pending the appeal, held that the requirement of reliability is applicable to named informants. *Thompson* v. *Commonwealth,* (Ky.) 472 S.W. 2d 884 (1971); *Berkshire* v. *Commonwealth,* (Ky.) 471 S.W. 2d 695 (1971). These cases were cited to the Kentucky Court in Petitioner's petition for rehearing. Petition for Rehearing, pp. 7, 8. Therefore, the search warrant would not have and could not have been upheld on the first portion of the affidavit.

The Kentucky Court of Appeals decided the issue involved in this petition by saying:

> "The affidavit in express language alleged that the officer Bowling on the 27th day of February, 1970, purchased ten grams of marijuana from appellant at his house trailer. Appellant concedes that this allegation was ample to support the issuance of the warrant but argues that the order of the trial court dismissing the indictments relating to the marijuana had the effect of removing that portion of the affidavit of officer Bowling relating to the marijuana. Appellant cites no authority for this proposition and we know no reason why it should be so.
>
> "The affidavit was regular in form and the statements contained therein sufficiently showed

probable cause. *It is not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause.* (Emphasis added) *Commonwealth* v. *Thacker*, 229 Ky. 488, 17 S.W. 2d 399 (1929).

"The twenty-five (25) tablets of LSD found in the search were properly admitted in evidence at the trial." Opinion of the Court of Appeals of Kentucky, pp. 4, 5, Appendix, *infra*, p. 18.

The facts of this case necessitated and the trial court did find that there was entrapment as a matter of law. All of the police methods condemned by this Court in *Sorrells* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958) are present here, and further evidence of the officer's unlawful conduct is the fact that he swore to at least one false affidavit to secure a search warrant. T. E., Vol. 3, pp. 49, 50; Def. Exh. 1, 2; Appendix, *infra*, pp. 26, 27. The trial court during the trial before the jury disallowed testimony with respect to the entrapment, dismissing the charges relating to the entrapped marijuana, but allowed the officer to use that information in an affidavit to support a search warrant.

If police are allowed to use the fruits of their illegal actions in affidavits to secure search warrants it will be repugnant to any concept of fairness and encourage the employment of such condemned practices. In this case the officer has realized the result he intended although the court has pronounced his means illegal. This general problem has been faced in a long line of decisions by this Court and the decision of the Court of Appeals of Kentucky is not in accord with applicable decisions of this Court. It should be pointed out that the Kentucky Court relied on a case decided in 1939 which was before this Court applied the exclu-

sionary rule to the states in *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Illegally obtained evidence cannot be used for any purpose against a defendant. *Weeks* v. *United States,* 232 U.S. 383 (1913). Illegally obtained evidence cannot be used as evidence to secure other evidence. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1919); *Nardone* v. *United States,* 308 U.S. 338 (1938); *Wong Sun* v. *United States,* 371 U.S. 471 (1963). To permit entrapped evidence to be used as a basis for the search warrant here violates the general rule of law in the cited cases. "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court, but that it shall not be used at all." *Silverthorne, supra,* p. 391. But for the illegally obtained information, there would have been no search at all. Not only was this illegally obtained information not usable at the trial, but its use in the affidavit was not proper.

In deciding this case the Court of Appeals of Kentucky decided a substantial federal constitutional question, that has not been decided by this court, and that decision is obviously in conflict with the holdings of the above cited cases.

At the present time both the federal and state courts are divided as to whether any attack may be made on the integrity of an affidavit in support of the issuance of a search warrant. There are many cases holding that Defendants have no right to question the integrity of affidavits. These holdings are dogmatic and without judicial reasoning. *People* v. *Bak,* (Ill.) 258 N.E. 2d 341, *cert. denied* 400 U.S. 882 (1970); *People* v. *Mitch-*

ell, (Ill.) 258 N.E. 2d 345, *cert. denied* 400 U.S. 882 (1970); *Seager* v. *State,* (Ind.) 164 N.E. 274 (1928); *Commonwealth* v. *Thacker,* (Ky.) 17 S.W. 2d 399 (1929); *Smith* v. *State,* (Md.) 62 A. 2d 287 (1948); *State* v. *Stevens,* (Mo.) 292 S.W. 36 (1927); *State* v. *English,* (Mont.) 229 P. 727 (1924); *Southard* v. *State,* (Okla.) 297 P. 2d 585 (1956); *Owens* v. *State,* (Tenn.) 399 S.W. 2d 507 (1965); *Griffey* v. *State,* (Tex.) 327 S.W. 2d 585 (1959); *Kenney* v. *United States,* 157 F. 2d 442 (App. D. C. 1946); *United States* v. *Brunett,* 53 F. 2d 219 (W.D. Mo. 1931).

On the other hand, cases allowing limited inquiry into the integrity of an affidavit have either relied on statutory authorization or have limited such inquiries to challenges on very narrow issues. *O'Bean* v. *State,* (Miss.) 184 So. 2d 635 (1966) (*dicta*); Cal. Pen. Code §§ 1539, 1540 (West 1970); *People* v. *Alfinito,* (N.Y.) 211 N.E. 2d 644 (1965); *United States* v. *Roth,* 391 F. 2d 507 (7th Cir. 1968); *United States* v. *Ramos,* 380 F. 2d 717 (2nd Cir. 1967) (Hearing on affidavit directed by District Court); *King* v. *United States,* 282 F. 2d 398 (4th Cir. 1960).

To allow an affidavit, which contains perjurious or illegally obtained information to support a search warrant is in conflict with the constitution and all concepts of justice and fairness. Obviously to allow such illegal conduct on the part of the police is violative of the constitutional rights of our citizens and will damage public confidence in our courts.

In this case the issue of entrapment was raised and hearing granted in the normal course of business of the court handling a criminal trial. The trial court was faced with the knowledge that a police officer had en-

trapped the defendant and had further used the information gained from that entrapment to secure the warrant. The trial judge had full knowledge of this illegal conduct by the police officer confronting him, yet had no remedy available because of the controlling precedent of Kentucky law. This happens often in reported cases and no doubt multitudinous times in unreported cases. It often comes to the attention of the trial court, through admissible testimony during trial or indirectly as it did in the instant case during a hearing on entrapment, that affidavit information was illegally obtained or false, but courts are forced to abide by precedents concluding that search warrant affidavits may not be impeached. States with precedents similar to the New York rule, *People* v. *Alfinito, supra,* allow impeachment of affidavits under the circumstances but those following the Texas rule would not allow impeachment even if admissible testimony at the trial proved the affidavit to be entirely false. *Griffey* v. *State, supra.*

The status of the rule that the affidavit cannot be attacked under any circumstances is similar to the law that once existed with respect to search warrants, *i.e.*, officers could not confiscate items in a search which were not authorized by the search warrant. The question then arose, should an officer ignore evidence of illegality or contraband once he sees it even though it is not expressly what he is looking for? The rule was properly changed to allow officers to confiscate evidence of illegality they observed in the normal course of a lawful search. How can trial courts continue to ignore illegality on the part of police officers when it becomes obvious during the normal course of the proceedings? Why is perjury or illegality more ac-

ceptable in affidavits, which are designed to protect a constitutional right, than during trials?

The sanctity given search warrant affidavits by the majority of our courts is unsupported by any sound judicial reasoning. When the courts deny the right to reasonably question affidavits made by police officers, who are pressured to make arrests and obtain convictions, and the right to question magistrates, who are many times unqualified to perform the duty we demand of them, constitutional protection becomes a sham. Denial of the right to reasonably question affidavits leaves our constitutional right to be free of unreasonable searches at the mercy of the law enforcement officer who may be dishonest.

Where during an exclusionary hearing or during the jury trial it becomes obvious to the trial judge that the affidavit and the search warrant are based upon perjury or illegally obtained or entrapped evidence the Fourteenth Amendment demands that the search warrant be quashed and the Defendant released if there is no other competent evidence to support the charges.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted,

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